

TTAB

Attorney Docket No.: 13105.1

BOX TTAB NO FEE

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Acorn Alegria Winery,
Dba Acorn Winery

Opposer,

v.

Sweely Holdings, LLC

Applicant.

Opposition No. 91/168,790
Appln. Serial No. 78/497,107,
78/497,110, 78/497,114

**NOTICE OF FILING
SUPPLEMENTAL
AUTHORITY**

Applicant, Sweely Holdings, LLC, hereby submits this notice of filing the following
supplemental authority:

Leelanau Wine Cellars, Ltd. v. Balck & Red, Inc., 502 F.3d 504, 84 U.S.P.Q.2d 125 (6th
Cir. 2007).

A copy of the above-cited case is attached hereto.

DATED this 17th of December, 2007.

Respectfully submitted,

SWEELY HOLDINGS, LLC

By: Jason J. Romero

Jonathan R. Ariano
Jason J. Romero
Karim Adatia

Attorneys for Sweely Holdings, LLC
Osborn Maledon, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012
(602) 640-9000
fax (602) 640-9050
e-mail: trademarks@omlaw.com



12-19-2007

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Filing Supplemental Authority was served on counsel for Opposer, this 17th day of December, 2007, by sending same via electronic and First Class Mail, postage prepaid, to:

Gregory N. Owen
Owen, Wickersham & Erickson, P.C.
455 Market Street, 19th Floor
San Francisco, CA 94105


By: Susan Whitaker

Westlaw.

502 F.3d 504

Page 1

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

H

LeelanauWineCellars, Ltd. v. Black & Red, Inc.
C.A.6 (Mich.),2007.

United States Court of Appeals, Sixth Circuit.
LEELANAUWINECELLARS, LTD,
Plaintiff-Appellant,
v.
BLACK & RED, INC. and Roberta Kurtz,
Defendants-Appellees.
No. 06-2391.

Argued: July 17, 2007.
Decided and Filed: Sept. 20, 2007.

Background: Wine producer brought action against competitor alleging trademark infringement and unfair competition under Lanham Act and state law claims. The district court granted summary judgment for competitor, and producer appealed. The Court of Appeals, 118 Fed.Appx. 942, reversed and remanded. The United States District Court for the Western District of Michigan, Gordon J. Quist, J., 452 F.Supp.2d 772, entered judgment for competitor. Producer appealed.

Holdings: The Court of Appeals, Julia Smith Gibbons, Circuit Judge, held that:

(1) statutory presumption of validity could be applied to "LEELANAU CELLARS" mark;

(2) competitor's use of mark "CHATEAU DE LEELANAU VINEYARD AND WINERY" was not likely to create actionable likelihood of confusion as to wine producer's "LEELANAU CELLARS" mark;

(3) federal designation of Leelanau Peninsula as Approved American Viticultural Area (AVA) substantially decreased possibility that potential consumer would, upon seeing "LEELANAU CELLARS" mark, necessarily think of wine product

that was marketed under that mark;

(4) competitor's production and sale of same product in shared geographical region did not weigh in favor of finding of likelihood of confusion;

(5) district court could refuse to assign significant weight in its likelihood of confusion analysis to consumer study presented by producer;


(6) anecdotal accounts of confusion, lacking in detail and primarily offered in form of hearsay at bench trial, were not entitled to substantial weight to establish actual confusion;

(7) lesser likelihood of purchaser confusion existed due to very limited overlap between distribution channels; and

(8) marks were not sufficiently similar that careful purchaser, seeking out wine from competitor's tasting room, would have incorrectly assumed that it was in fact purchasing wine from plaintiff.

Affirmed.

West Headnotes

[1] Trademarks 382T  1039

382T Trademarks

382TII Marks Protected

382Tk1039 k. Arbitrary or Fanciful Terms or Marks. Most Cited Cases

An arbitrary mark, which can be protected under the Lanham Act, has a significance recognized in everyday life, but the thing it normally signifies is unrelated to the product or service to which the mark is attached. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[2] Trademarks 382T  1039

382T Trademarks

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

502 F.3d 504

Page 2

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

382TII Marks Protected

382Tk1039 k. Arbitrary or Fanciful Terms or Marks. Most Cited Cases

A fanciful mark, which can be protected under the Lanham Act, is a combination of letters or symbols signifying nothing other than the product or service to which the mark has been assigned. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[3] Trademarks 382T 1038

382T Trademarks

382TII Marks Protected

382Tk1038 k. Suggestive Terms or Marks. Most Cited Cases

A suggestive mark, which can be protected under the Lanham Act, suggests rather than describes an ingredient or characteristic of the goods and requires the observer or listener to use imagination and perception to determine the nature of the goods. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[4] Trademarks 382T 1034

382T Trademarks

382TII Marks Protected

382Tk1034 k. Generic Terms or Marks. Most Cited Cases

A generic term, which may never qualify for trademark protection under the Lanham Act, is one that is commonly used as the name of a kind of goods; unlike a trademark, which identifies the source of a product, a generic term merely identifies the genus of which a particular product is a species. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[5] Trademarks 382T 1036

382T Trademarks

382TII Marks Protected

382Tk1035 Descriptive Terms or Marks

382Tk1036 k. In General. Most Cited Cases

Trademarks 382T 1037

382T Trademarks

382TII Marks Protected

382Tk1035 Descriptive Terms or Marks

382Tk1037 k. Acquired Distinctiveness; Secondary Meaning. Most Cited Cases

Under the Lanham Act, a merely descriptive mark, which is not entitled to trademark protection under the Lanham Act without secondary meaning, is often said to identify a characteristic of the thing; it is very similar to an adjective. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[6] Trademarks 382T 1030

382T Trademarks

382TII Marks Protected

382Tk1029 Capacity to Distinguish or Signify; Distinctiveness

382Tk1030 k. In General. Most Cited Cases

Only those marks that are "distinctive" as a matter of law are accorded trademark protection under the Lanham Act. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[7] Trademarks 382T 1037

382T Trademarks

382TII Marks Protected

382Tk1035 Descriptive Terms or Marks

382Tk1037 k. Acquired Distinctiveness; Secondary Meaning. Most Cited Cases

Trademarks 382T 1048

382T Trademarks

382TII Marks Protected

382Tk1045 Geographical Terms or Names as Marks

382Tk1048 k. Acquired Distinctiveness; Secondary Meaning. Most Cited Cases

Marks that are descriptive are not inherently distinctive but may enjoy the benefit of protection under the Lanham Act if they develop a "secondary meaning"; this rule applies equally to phrases or terms that are descriptive of the geographic origin of a product. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[8] Trademarks 382T 1037

382T Trademarks

502 F.3d 504

Page 3

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

382TII Marks Protected

382Tk1035 Descriptive Terms or Marks

382Tk1037 k. Acquired Distinctiveness; Secondary Meaning. Most Cited Cases
Under the Lanham Act, a descriptive mark achieves secondary meaning when in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[9] Trademarks 382T 860

382T Trademarks

382TII Marks Protected

382Tk1045 Geographical Terms or Names as Marks

382Tk1048 k. Acquired Distinctiveness; Secondary Meaning. Most Cited Cases
Under the Lanham Act, a geographically descriptive mark that has acquired secondary meaning no longer causes the public to associate the goods at issue with a particular place but to associate the goods with a particular source. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[10] Trademarks 382T 1047(1)

382T Trademarks

382TII Marks Protected

382Tk1045 Geographical Terms or Names as Marks

382Tk1047 Descriptiveness
382Tk1047(1) k. In General. Most Cited Cases
Under the Lanham Act, where it is determined that the mark as perceived by potential purchasers describes the geographical origin of the goods the mark is primarily geographically descriptive. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[11] Trademarks 382T 1363

382T Trademarks

382TVII Registration

382TVII(C) Effect of Federal Registration

382Tk1358 Particular Effects; Rights Acquired

382Tk1363 k. Nature or Type of Mark; Distinctiveness and Strength. Most Cited Cases

The effect of the statutory rebuttable presumption that a trademark is valid is to shift the burden of proof to the alleged infringer to prove the absence of secondary meaning. Lanham Act, § 33(a), 15 U.S.C.A. § 1115(a).

[12] Federal Courts 170B 860

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)5 Questions of Fact, Verdicts and Findings

170Bk855 Particular Actions and Proceedings, Verdicts and Findings

170Bk860 k. Copyrights, Patents and Trade Regulation. Most Cited Cases

A district court's conclusion that a registered mark had not acquired secondary meaning is reviewed for clear error. Lanham Act, §§ 32, 33(a), 15 U.S.C.A. §§ 1114, 1115(a).

[13] Trademarks 382T 1368

382T Trademarks

382TVII Registration

382TVII(C) Effect of Federal Registration

382Tk1364 Scope of Rights Acquired; Limitations

382Tk1368 k. Words or Symbols Constituting Mark. Most Cited Cases

Statutory presumption of validity could be applied to "LEELANAU CELLARS" mark, although winery did not register word "Leelanau" alone. Lanham Act, § 33(a), 15 U.S.C.A. § 1115(a).

[14] Trademarks 382T 1084

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1083 Nature of Confusion

382Tk1084 k. In General. Most Cited Cases

Trademarks 382T 1421

382T Trademarks

382TVIII Violations of Rights

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

502 F.3d 504

Page 4

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

382TVIII(A) In General

382Tk1418 Practices or Conduct
Prohibited in General; Elements

382Tk1421 k. Infringement. Most
Cited Cases

The touchstone of liability for trademark infringement under the Lanham Act is whether the defendant's use of the disputed mark is likely to cause confusion among consumers regarding the origin of the goods offered by the parties. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[15] Trademarks 382T 1081

382T Trademarks

382TIII Similarity Between Marks; Likelihood
of Confusion

382Tk1081 k. Factors Considered in General.
Most Cited Cases

On a claim of trademark infringement under the Lanham Act, an eight-factor test is used in ascertaining whether a likelihood of confusion exists: (1) strength of the senior mark; (2) relatedness of the goods or services; (3) similarity of the mark; (4) evidence of actual confusion; (5) marketing channel used; (6) likely degree of purchaser care; (7) the intent of defendant in selecting the mark; and (8) likelihood of expansion of the product lines. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[16] Trademarks 382T 1084

382T Trademarks

382TIII Similarity Between Marks; Likelihood
of Confusion

382Tk1083 Nature of Confusion

382Tk1084 k. In General. Most Cited
Cases

On a claim of trademark infringement under the Lanham Act, the ultimate question is whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[17] Trademarks 382T 1092

382T Trademarks

382TIII Similarity Between Marks; Likelihood
of Confusion

382Tk1090 Nature of Marks

382Tk1092 k. Strength or Fame of Marks;
Degree of Distinctiveness. Most Cited Cases

Trademarks 382T 1096(2)

382T Trademarks

382TIII Similarity Between Marks; Likelihood
of Confusion

382Tk1093 Relationship Between Marks

382Tk1096 Particular Marks, Similarity
or Confusion Involving

382Tk1096(2) k. As Applied to
Particular Goods or Services. Most Cited Cases

Trademarks 382T 1110

382T Trademarks

382TIII Similarity Between Marks; Likelihood
of Confusion

382Tk1107 Nature and Circumstances of Use
of Marks

382Tk1110 k. Trade Channels; Sales, Advertising, and Marketing. Most Cited Cases
Competitor's use of mark "CHATEAU DE LEELANAU VINEYARD AND WINERY" was not likely to create actionable likelihood of confusion under Lanham Act as to wine producer's "LEELANAU CELLARS" mark, since producer's mark, which was geographically descriptive, was relatively weak, Leelanau Peninsula was long-established viticultural designation of wine, marks were not confusingly similar, and large majority of competitor's wine was sold through its tasting rooms, in environment that tended to foster clarification, rather than confusion, about source of competitor's wine. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[18] Federal Courts 170B 860

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)5 Questions of Fact, Verdicts
and Findings

170Bk855 Particular Actions and

502 F.3d 504

Page 5

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

Proceedings, Verdicts and Findings

170Bk860 k. Copyrights, Patents and Trade Regulation. Most Cited Cases
On a claim of trademark infringement under the Lanham Act, when reviewing a district court's decision on the issue of a likelihood of confusion following a bench trial, any relevant factual findings are examined for clear error. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[19] Federal Courts 170B ⚡776

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk776 k. Trial De Novo. Most Cited Cases

On a claim of trademark infringement under the Lanham Act, whether a likelihood of confusion exists is a mixed question of law and fact subject to de novo review. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[20] Federal Courts 170B ⚡860

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)5 Questions of Fact, Verdicts and Findings

170Bk855 Particular Actions and Proceedings, Verdicts and Findings

170Bk860 k. Copyrights, Patents and Trade Regulation. Most Cited Cases

Trademarks 382T ⚡1691

382T Trademarks

382TIX Actions and Proceedings

382TIX(E) Trial and Judgment

382Tk1682 Questions of Law or Fact

382Tk1691 k. Similarity; Likelihood of Confusion. Most Cited Cases

Determination of what is state of affairs regarding each factor considered by lower court in determining whether there was likelihood of confusion, for purposes of determining whether there was violation of the Lanham Act, is a finding

of fact reviewed on a clearly erroneous standard, but further determination of likelihood of confusion based on those factors is a legal conclusion. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[21] Trademarks 382T ⚡1092

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1090 Nature of Marks

382Tk1092 k. Strength or Fame of Marks; Degree of Distinctiveness. Most Cited Cases
Federal designation of Leelanau Peninsula as Approved American Viticultural Area (AVA) substantially decreased possibility that potential consumer would, upon seeing "LEELANAU CELLARS" mark, necessarily think of wine product that was marketed under that mark. Lanham Act, § 32, 15 U.S.C.A. § 1114; 27 C.F.R. §§ 9.11, 9.40.

[22] Trademarks 382T ⚡1033

382T Trademarks

382TII Marks Protected

382Tk1033 k. Levels or Categories of Distinctiveness in General; Strength of Marks in General. Most Cited Cases

Under the Lanham Act, the strength of a mark is a factual determination of the mark's distinctiveness. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[23] Trademarks 382T ⚡1033

382T Trademarks

382TII Marks Protected

382Tk1033 k. Levels or Categories of Distinctiveness in General; Strength of Marks in General. Most Cited Cases

Trademarks 382T ⚡1092

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1090 Nature of Marks

382Tk1092 k. Strength or Fame of Marks; Degree of Distinctiveness. Most Cited Cases
Under the Lanham Act, a stronger mark is accorded

502 F.3d 504

Page 6

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

greater protection and encroachment upon a strong mark is deemed more likely to produce confusion among buyers. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[24] Trademarks 382T 1101

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1100 Relationship Between Goods or Services Underlying Marks

382Tk1101 k. In General. Most Cited Cases

Trademarks 382T 1104

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1100 Relationship Between Goods or Services Underlying Marks

382Tk1104 k. Markets and Territories; Competition. Most Cited Cases

If trademark infringement plaintiff and defendant compete directly, confusion is likely if marks are sufficiently similar, while if goods and services are somewhat related, but not competitive, then likelihood of confusion will turn on other factors, and if products are unrelated, confusion is highly unlikely; services and goods are related not because they co-exist in the same broad industry, but are related if the services are marketed and consumed such that buyers are likely to believe that the services, similarly marked, come from the same source, or are somehow connected with or sponsored by a common company. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[25] Trademarks 382T 1104

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1100 Relationship Between Goods or Services Underlying Marks

382Tk1104 k. Markets and Territories; Competition. Most Cited Cases

Trademarks 382T 1110

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1107 Nature and Circumstances of Use of Marks

382Tk1110 k. Trade Channels; Sales, Advertising, and Marketing. Most Cited Cases

Competitor's production and sale of same product in shared geographical region did not weigh in favor of finding of likelihood of confusion, for purpose of trademark infringement claim under Lanham Act, since wine producer and competitor did not possess similar marks and there was very limited overlap in their distribution channels. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[26] Trademarks 382T 1095

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1093 Relationship Between Marks

382Tk1095 k. Similarity or Dissimilarity in General. Most Cited Cases

On a claim of trademark infringement under the Lanham Act, similarity of marks is a factor of considerable weight. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[27] Trademarks 382T 1098

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1093 Relationship Between Marks

382Tk1098 k. Appearance, Sound, and Meaning. Most Cited Cases

On a claim of trademark infringement under the Lanham Act, when assessing similarity, a court should consider the pronunciation, appearance, and verbal translation of conflicting marks. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[28] Trademarks 382T 1096(2)

382T Trademarks

382TIII Similarity Between Marks; Likelihood

502 F.3d 504

Page 7

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

of Confusion

382Tk1093 Relationship Between Marks

382Tk1096 Particular Marks, Similarity
or Confusion Involving382Tk1096(2) k. As Applied to
Particular Goods or Services. Most Cited Cases**Trademarks 382T 1098**

382T Trademarks

382TIII Similarity Between Marks; Likelihood
of Confusion

382Tk1093 Relationship Between Marks

382Tk1098 k. Appearance, Sound, and
Meaning. Most Cited Cases

Competitor's "CHATEAU DE LEELANAU VINEYARD AND WINERY" mark and wine producer's "LEELANAU CELLARS" mark were not so similar that they would have produced likelihood of confusion among purchasers, despite marks' shared use of word "Leelanau"; words in competitor's mark were terms often associated with wine producing, remainder of competitor's mark was in French, competitor's mark contained far more syllables, marks were visually dissimilar, Chateau de Leelanau mark, which appeared in italics, was accompanied by cluster of grapes, and producer used number of images with its mark, which was composed of all capital letters, many of which depicted nature scenes or ships. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[29] Trademarks 382T 1097

382T Trademarks

382TIII Similarity Between Marks; Likelihood
of Confusion

382Tk1093 Relationship Between Marks

382Tk1097 k. Examination and
Comparison; Construction as Entirety. Most Cited
Cases

On a claim of trademark infringement under the Lanham Act, courts must view marks in their entirety and focus on their overall impressions, not individual features. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[30] Trademarks 382T 1629(2)

382T Trademarks

382TIX Actions and Proceedings

382TIX(C) Evidence

382Tk1620 Weight and Sufficiency

382Tk1629 Similarity; Likelihood of
Confusion

382Tk1629(2) k. Actual Confusion.

Most Cited Cases

On a claim of trademark infringement under the Lanham Act, evidence of actual confusion is the best evidence of likelihood of confusion. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[31] Trademarks 382T 1629(4)

382T Trademarks

382TIX Actions and Proceedings

382TIX(C) Evidence

382Tk1620 Weight and Sufficiency

382Tk1629 Similarity; Likelihood of
Confusion

382Tk1629(4) k. Surveys. Most

Cited Cases

District court could refuse to assign significant weight in its likelihood of confusion analysis to consumer study presented by trademark owner, in context of infringement claim under Lanham Act, where universe of respondents was overbroad and did not include individuals who were potential purchasers of competitor's product, survey did not replicate conditions that consumers would have encountered in marketplace, and survey questions were suggestive and misleading. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[32] Trademarks 382T 1629(4)

382T Trademarks

382TIX Actions and Proceedings

382TIX(C) Evidence

382Tk1620 Weight and Sufficiency

382Tk1629 Similarity; Likelihood of
Confusion

382Tk1629(4) k. Surveys. Most

Cited Cases

On a claim of trademark infringement under the Lanham Act, where a survey presented on the issue of actual confusion reflects methodological errors, a court may choose to limit the importance it accords

502 F.3d 504

Page 8

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

the study in its likelihood of confusion analysis.
Lanham Act, § 32, 15 U.S.C.A. § 1114.

[33] Trademarks 382T 1629(3)

382T Trademarks

382TIX Actions and Proceedings

382TIX(C) Evidence

382Tk1620 Weight and Sufficiency

382Tk1629 Similarity; Likelihood of
Confusion

382Tk1629(3) k. Particular Cases.

Most Cited Cases

Anecdotal accounts of confusion, lacking in detail and primarily offered in form of hearsay at bench trial, were not entitled to substantial weight to establish actual confusion on trademark infringement claim under Lanham Act. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[34] Trademarks 382T 1110

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1107 Nature and Circumstances of Use of Marks

382Tk1110 k. Trade Channels; Sales, Advertising, and Marketing. Most Cited Cases
Courts consider the respective marketing channels of the parties to a trademark infringement action under the Lanham Act to determine how and to whom the respective goods or services of the parties are sold; there is less likelihood of confusion where the goods are sold through different avenues. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[35] Trademarks 382T 1110

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1107 Nature and Circumstances of Use of Marks

382Tk1110 k. Trade Channels; Sales, Advertising, and Marketing. Most Cited Cases
Lesser likelihood of purchaser confusion existed due to very limited overlap between distribution channels utilized by competitor and wine producer,

for purpose of producer's trademark infringement claim under Lanham Act, where competitor sold approximately 85 percent of its wine through its tasting rooms and did not sell to major retail operations but producer sold 25 to 30 percent of its wines through its tasting rooms and remaining 70 to 75 percent through retail stores. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[36] Trademarks 382T 1112

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1112 k. Persons Confused; Circumstances of Sale. Most Cited Cases

On a claim of trademark infringement under the Lanham Act, when assessing the degree of purchaser care, courts typically use a "typical buyer exercising ordinary caution" standard; when potential buyers possess special expertise or are sophisticated purchasers of the goods at issue, a higher standard is appropriate, and the likelihood of confusion decreases, and, similarly, purchasers of more expensive products are more likely to exercise care, thus reducing the possibility of confusion. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[37] Trademarks 382T 1096(2)

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1093 Relationship Between Marks

382Tk1096 Particular Marks, Similarity or Confusion Involving

382Tk1096(2) k. As Applied to Particular Goods or Services. Most Cited Cases

Trademarks 382T 1112

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1112 k. Persons Confused; Circumstances of Sale. Most Cited Cases

Competitor's "CHATEAU DE LEELANAU VINEYARD AND WINERY" mark and wine producer's "LEELANAU CELLARS" mark were

502 F.3d 504

Page 9

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

not sufficiently similar that careful purchaser, seeking out wine from competitor's tasting room, would have incorrectly assumed that it was in fact purchasing wine from plaintiff wine producer, for purpose of claim of trademark infringement under Lanham Act; although purchasers of parties' moderately priced wines typically were making impulse buys and not exercising caution in selecting wine, competitor's wine was not sold through retail channels, but, instead, through tasting rooms, which often involved process of tasting and comparing various types of wine. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[38] Trademarks 382T 1111

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1111 k. Intent; Knowledge of Confusion or Similarity. Most Cited Cases
Competitor demonstrated that it did not select "CHATEAU DE LEELANAU VINEYARD AND WINERY" mark in hope of creating confusion with wine producer's "LEELANAU CELLARS" mark, despite its awareness of producer's mark, where competitor expressly denied effort to profit improperly from producer's name recognition and competitor chose its name for both geographic and personal reasons; competitor originally selected "Le Couer de Leelanau," or "the heart of Leelanau" in French, because of their winery's location in Leelanau Peninsula, but name was changed after hearing it repeatedly mispronounced as "liquor" or "leaker" or "looker." Lanham Act, § 32, 15 U.S.C.A. § 1114.

[39] Trademarks 382T 1437

382T Trademarks

382TVIII Violations of Rights

382TVIII(A) In General

382Tk1437 k. Knowledge, Intent, and Motives; Bad Faith. Most Cited Cases
The intent of the defendant in a trademark action is relevant because purposeful copying indicates that the alleged infringer believes that his copying may divert some business from the senior user. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[40] Trademarks 382T 1437

382T Trademarks

382TVIII Violations of Rights

382TVIII(A) In General

382Tk1437 k. Knowledge, Intent, and Motives; Bad Faith. Most Cited Cases
On a claim of trademark infringement under the Lanham Act, intent of the alleged infringer is an issue whose resolution may benefit only the cause of the senior user, not of an alleged infringer. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[41] Trademarks 382T 1104

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1100 Relationship Between Goods or Services Underlying Marks

382Tk1104 k. Markets and Territories; Competition. Most Cited Cases
On a claim of trademark infringement under the Lanham Act, a strong likelihood that the alleged infringer will expand its business to compete with a senior user will contribute to a finding of a violation. Lanham Act, § 32, 15 U.S.C.A. § 1114.

[42] Trademarks 382T 1425

382T Trademarks

382TVIII Violations of Rights

382TVIII(A) In General

382Tk1423 Particular Cases, Practices, or Conduct

382Tk1425 k. Unfair Competition in General. Most Cited Cases
Adverse resolution of winery's trademark infringement claim under Lanham Act also disposed of its unfair competition claim because success of unfair competition claim required showing that alleged infringer's actions created likelihood of confusion. Lanham Act, §§ 32, 43, 15 U.S.C.A. §§ 1114, 1125.

Trademarks 382T 1800

382T Trademarks

382TXI Trademarks and Trade Names

502 F.3d 504

Page 10

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

Adjudicated

382Tk1800 k. Alphabetical Listing. Most
Cited Cases
CHATEAU DE LEELANAU VINEYARD AND
WINERY.

Trademarks 382T 1800

382T Trademarks

382TXI Trademarks and Trade Names
Adjudicated

382Tk1800 k. Alphabetical Listing. Most
Cited Cases
LEELANAU CELLARS.

***510 ARGUED:** Kenneth B. Morgan, Morgan Associates, PLC, Birmingham, Michigan, for Appellant. Thomas Richard Behm, Gruel Mills Nims & Plyman, Grand Rapids, Michigan, for Appellees. **ON BRIEF:** Kenneth B. Morgan, K. Dino Kostopoulos, Morgan Associates, PLC, Birmingham, Michigan, for Appellant. Thomas Richard Behm, Brion J. Brooks, Gruel Mills Nims & Plyman, Grand Rapids, Michigan, for Appellees.

Before: GIBBONS and SUTTON, Circuit Judges;
BECKWITH, Chief District Judge.^{FN*}

FN* The Honorable Sandra S. Beckwith, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

This case arose out of a trademark dispute between two Michigan wine producers: plaintiff-appellant Leelanau Wine Cellars, Ltd (LWC) and defendant-appellee Black & Red, Inc. (B & R), owned by defendant-appellee Roberta Kurtz. Following district court proceedings that resulted in an appeal to this court and a remand to the district court, the district court conducted a bench trial on LWC's Lanham Trademark Act, 15 U.S.C. § 1114, claim. Following the bench trial, the district court issued written findings of fact and conclusions of law in which it rejected LWC's claim that B & R's

use of the mark "Chateau de Leelanau Vineyard and Winery" created a likelihood of confusion among consumers. The court entered judgment in favor of defendants-appellees, and LWC appealed.

For the reasons below, we affirm the district court.

I.

In 1981, Michigan's Leelanau Peninsula was designated an Approved American Viticultural Area (AVA). 27 C.F.R. § 9.40. Federal regulation defines a "viticultural area" as a "delimited grape-growing region distinguishable by geographical features, the boundaries of which have been delineated..." 27 C.F.R. § 9.11. An area's designation as an AVA permits the name of the area to be used as an "appellation of origin" on wine labels and in advertising.

Both LWC and B & R own and operate wineries located in the Leelanau Peninsula. LWC began operating its winery in 1977. In 1997, LWC successfully applied *511 with the United States Patent and Trademark Office (USPTO) for registration of the mark "Leelanau Cellars" on the Principal Register. In 1990, Kurtz and Joanne Smart ^{FN1} formed B & R. B & R was initially devoted exclusively to growing fruit, including apples, cherries, plums, and grapes and, prior to 1999, sold its grape harvest to wineries, including LWC. In 1995, B & R received permission from the Michigan Department of Commerce to do business as "Le Coeur de Leelanau" and registered that entity as a vineyard and winery. In 1999, B & R, for the first time, utilized a part of its grape harvest to produce wine. B & R elected in 2000 to change the name Le Coeur de Leelanau to "Chateau de Leelanau Vineyard and Winery." That same year, B & R received permission from the Bureau of Alcohol, Tobacco, and Firearms to sell wine. B & R began selling its wine in earnest in January 2001 and ceased its other fruit growing activities in 2005. During this period, B & R was aware of the existence of LWC and had been for approximately 20 years.

502 F.3d 504

Page 11

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

FN1. Smart died in 2005.

In October 2000, Michael Jacobson, the owner of LWC, directed a letter to Kurtz and Smart notifying them that their use of the word "Leelenau" as part of the name for their wine "infringes upon the exclusive rights we have to do business under the names Leelanau Wine Cellars, Ltd. and Leelanau Cellars." B & R continued to utilize the name, however, and ultimately applied for and received a trademark from the state of Michigan in November 2000. In October 2003, B & R successfully registered the name Chateau de Leelanau Vineyard and Winery on the Principal Register of the USPTO. Smart testified that B & R believed-after consultation with attorneys-that LWC was incorrect in asserting that it held the exclusive right to use the word "Leelanau" in its brand name.

On May 23, 2001, LWC filed suit against B & R, Smart, and Kurtz in the United States District Court for the Western District of Michigan. An amended complaint followed on September 28, 2001. The amended complaint raised two claims under the Lanham Trademark Act, 15 U.S.C. §§ 1114 and 1125, a claim for common law unfair competition, and a claim under the Michigan Consumer Protection Act, Mich. Comp. Laws § § 445.901-445.922. On August 13, 2002, the district court issued a written order granting LWC's motion for partial summary judgment on the issue of liability on LWC's federal trademark claims and permanently enjoining B & R from using the term "Leelanau" in any trade or brand name for the sale of wine.^{FN2} Following a two-day bench trial on August 28 and 29, 2002, on the issue of willfulness, the district court sent a letter dated October 11, 2002, to counsel, notifying them that it "probably erred" in granting summary judgment and a preliminary injunction to LWC. In light of the evidence at the bench trial, the district court explained, it was likely to rule that there was not a sufficient likelihood of confusion and rule in favor of B & R, but remained "open minded on the issue."

The court issued an order November 21, 2002, setting forth the bases for its belief that its previous ruling was incorrect. LWC sought the opportunity to conduct a consumer survey, and the court denied that motion. On February 14, 2003, the court

entered judgment in favor of B & R, withdrew its August 13 order in favor of LWC, and lifted the *512 previously imposed injunction against B & R's use of the word "Leelanau." LWC appealed to the Sixth Circuit on March 13, 2003. On appeal, a panel of our court affirmed the district court's power to reconsider its previous ruling unilaterally, but reversed and remanded with instructions to the district court to permit LWC to conduct its consumer survey.

FN2. The court issued a subsequent order on September 4, 2002, stating that with regard to bottles of wine already bearing a Chateau de Leelanau label, B & R could merely affix an additional label notifying purchasers that Chateau de Leelanau was not affiliated with LWC.

On remand, the district court permitted LWC to conduct its desired consumer survey. On August 15, 2006, the court held a bench trial on the issues of liability and damages. The district court issued its findings of fact and conclusions of law on September 7, 2006. In its order, the court considered the admissibility of LWC's consumer survey, conducted by Dr. Sara Parikh. It found that the survey was potentially unreliable but nevertheless allowed its admission. On the central issue of the likelihood of consumer confusion, the court applied the eight-factor test used in the Sixth Circuit to evaluate trademark infringement claims. It concluded that LWC did not possess a strong mark and that, because B & R distributed its wine primarily through its tasting rooms, it was unlikely that consumers would have to distinguish between LWC wines and B & R wines or incorrectly associate the company's products. Accordingly, the court determined that LWC failed to carry its burden of showing a likelihood of confusion among relevant consumers and entered judgment on behalf of B & R. LWC filed a timely notice of appeal.

II.

Federal law provides:

(1) Any person who shall, without the consent of

502 F.3d 504

Page 12

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

the registrant-

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided.

15 U.S.C. § 1114(1)(a)-(b).

A.

[1][2][3][4][5][6][7][8][9] Only those marks that are “distinctive” as a matter of law are accorded trademark protection. *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 635 (6th Cir.2002). Certain marks, described as “arbitrary,” “fanciful,” or “suggestive” are “inherently distinctive” and protectable.^{FN3} See *513 *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992). A so-called “generic” mark may never qualify for trademark protection.^{FN4} *Id.* Between these two poles lie “descriptive” marks.^{FN5} Marks that are descriptive are not inherently distinctive but may enjoy the benefit of protection if they develop a “secondary meaning.” *Id.* at 769; *Tumblebus*, 399 F.3d at 761. This rule applies equally to phrases or terms that are “descriptive of the geographic origin of a product.” *Forschner Group, Inc. v. Arrow Trading Co., Inc.*, 30 F.3d 348, 353 (2d Cir.1994). A descriptive mark achieves secondary meaning when “in the minds of the public, the primary significance of a product feature or term is to identify the source of the product

rather than the product.” *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n. 11, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982). A geographically descriptive mark that has acquired secondary meaning “no longer causes the public to associate the goods [at issue] with a particular place but to associate the goods with a particular source.” *Burke-Parsons-Bowlby Corp. v. Appalachian Log Homes, Inc.*, 871 F.2d 590, 595 (6th Cir.1989).

FN3. An arbitrary mark “has a significance recognized in everyday life, but the thing it normally signifies is unrelated to the product or service to which the mark is attached, such as CAMEL cigarettes or APPLE computers.” *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 761 n. 6 (6th Cir.2005). A fanciful mark “is a combination of letters or symbols signifying nothing other than the product or service to which the mark has been assigned.” *Id.* at 761 n. 7. A suggestive mark “suggests rather than describes an ingredient or characteristic of the goods and requires the observer or listener to use imagination and perception to determine the nature of the goods.” *Id.* at 761 n. 5 (internal quotation marks omitted).

FN4. “A generic term is one that is commonly used as the name of a kind of goods. Unlike a trademark, which identifies the source of a product, a generic term merely identifies the genus of which a particular product is a species.” *Tumblebus, Inc.*, 399 F.3d at 762 n. 10 (internal quotation marks omitted).

FN5. “A merely descriptive mark ... is often said to identify a characteristic of the thing. It is very similar to an adjective.” *Tumblebus, Inc.*, 399 F.3d at 761 n. 8 (internal quotation marks omitted).

[10] The district court deemed LWC's mark geographically descriptive, and the parties rightly do not contest the correctness of that determination, as it is not clearly erroneous, *DeGidio v. West*

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

502 F.3d 504

Page 13

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

Group Corp., 355 F.3d 506, 511 (6th Cir.2004) (“Ordinarily, we review the district court’s classification of a term as ‘descriptive’ or ‘suggestive’ under the clear error standard.”). “Where it is determined that the mark as perceived by potential purchasers describes the geographical origin of the goods the mark is primarily geographically descriptive.” *Burke-Parsons-Bowlby Corp.*, 871 F.2d at 594; see also *Forschner Group, Inc.*, 30 F.3d at 355 (“A geographically descriptive term or phrase is one that designates geographical location and would tend to be regarded by buyers as descriptive of the geographic location of origin of the goods or services.”) (internal quotation marks omitted). The parties do, however, vigorously dispute whether LWC’s mark possessed secondary meaning, entitling it to trademark protection. Although B & R does not expressly challenge the validity of LWC’s trademark, its claim that “LWC’s descriptive trademark never attained a secondary meaning or incontestability” is, in fact, a challenge to the LWC mark’s registration, and we address that issue first.

[11] Registration of a mark on the Principal Register of the USPTO creates a rebuttable presumption that a trademark is valid, that is, either inherently distinctive or descriptive with secondary meaning, and therefore, protectable under federal trademark law. 15 U.S.C. § 1115(a) (providing that registration on the principal register “shall be *prima facie* evidence of the validity of the registered mark..”). Because LWC possesses a descriptive mark, its registration must have been on the basis of the USPTO’s determination that its mark had obtained a secondary meaning.^{FN6} See *514 *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 638 (7th Cir.2001) (“Once a mark is registered, the Act affords a plaintiff one of two presumptions: (1) that her registered trademark is not merely descriptive or generic; or (2) that if descriptive, the mark is accorded secondary meaning.”). The effect of the statutory presumption contained in § 1115(a) is to shift the burden of proof to the alleged infringer, in this case B & R, to prove the absence of secondary meaning. See *Burke-Parsons-Bowlby Corp.*, 871 F.2d at 593.

FN6. The parties have provided us with limited information concerning LWC’s application process with the USPTO, but it appears that LWC received registration under 15 U.S.C. § 1052, suggesting that the USPTO found the mark to be descriptive but with secondary meaning.

[12] The district court’s conclusion that LWC’s mark had not acquired secondary meaning is reviewed for clear error. See *Ashland Oil, Inc. v. Olymco, Inc.*, No. 94-5520, 1995 WL 499466, *3 (6th Cir. Aug.21, 1995). In its September 2006 ruling, the district court considered the secondary meaning question in the context of discussing the strength of LWC’s mark. The court recognized that LWC’s Leelanau Cellars mark was entitled to a presumption of secondary meaning under the Lanham Act. It went on to observe, however, that LWC actually sought a determination that “relevant consumers understand that the use of the term ‘Leelanau’ in connection with the sale of Michigan wine refers to LWC as the source of the wine rather than to the wine itself.” It concluded that “[b]ecause ‘Leelanau’ alone is solely geographically descriptive and is not LWC’s registered mark,” the statutory presumption did not apply, “because there is no basis to conclude that the United States Patent and Trademark Office determined that ‘Leelanau’ alone had obtained secondary meaning in connection with LWC’s use of LEELANAU CELLARS in its sales of wine.” The district court’s finding that LWC’s mark was descriptive but lacking in secondary meaning should have ended its analysis, as a descriptive mark without secondary meaning is not entitled to trademark protection. See *Two Pesos, Inc.*, 505 U.S. at 769, 112 S.Ct. 2753.

[13] The district court erred in determining that LWC was not entitled to the benefit of a statutory presumption of validity because it did not register the word “Leelanau” alone. In *Burke-Parsons-Bowlby Corp.*, our court confronted a similar factual situation, where the holder of a registered trademark for the term “Appalachian Log Structures” sought to have Appalachian Log Homes, Inc. enjoined from the use of the phrase “Appalachian Log Homes.” 871 F.2d at 592.

502 F.3d 504

Page 14

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

There, the court deemed the trademark holder entitled to the statutory presumption of validity under 15 U.S.C. § 1115(a), despite the holder's failure to register the word "Appalachian" with the USPTO. *Id.* at 593. We believe that LWC was likewise entitled to the presumption afforded under § 1115.

LWC's mark has not achieved incontestable status, *see* 15 U.S.C. 1065, ^{FN7} and B & R was thus free to attempt to rebut the § 1115 presumption of secondary meaning. Having denied LWC the benefit of the presumption of secondary meaning, the district court failed to assess the evidence in the record to determine whether the presumption had been rebutted. We note that there is strong evidence in the record tending to undermine LWC's claim of secondary meaning. As the district court *515 noted, the Leelanau Peninsula has been a federally-recognized wine-producing region since 1981. That designation has spawned the Leelanau Peninsula Vintner's Association (LPVA), consisting of 13 wineries, including Chateau de Leelanau and Leelanau Cellars. The government's recognition of the Leelanau Peninsula as a source of wine for more than 20 years as well as the existence of the LPVA would seem to undermine LWC's contention that "Leelanau" is necessarily associated with wine products coming from Leelanau Cellars. We ultimately decline to resolve this issue, as we think it outside our purview as an appellate court to weigh evidence never properly considered by the district court. However, as explained *infra*, we nevertheless affirm the district court's judgment on the ground that LWC has failed to demonstrate a likelihood of confusion created by B & R's use of its mark.

FN7. Title 15, section 1065 provides that the right of a registrant to use a mark registered on the Principal Register shall be incontestable where the mark "has been in continuous use for five consecutive years subsequent to the date of registration" and is still used in commerce, provided that certain conditions are met. 15 U.S.C. § 1065.

B.

[14][15][16][17] "The touchstone of liability under § 1114 is whether the defendant's use of the disputed mark is likely to cause confusion among consumers regarding the origin of the goods offered by the parties." *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 280 (6th Cir.1997). The Sixth Circuit utilizes an eight-factor test in ascertaining whether a likelihood of confusion exists:

- (1) strength of the senior mark;
- (2) relatedness of the goods or services;
- (3) similarity of the marks;
- (4) evidence of actual confusion;
- (5) marketing channels used;
- (6) likely degree of purchaser care;
- (7) the intent of defendant in selecting the mark; and
- (8) likelihood of expansion of the product lines.

Kellogg Co. v. Exxon Corp., 209 F.3d 562, 568 (6th Cir.2000). In applying these factors, the court has cautioned that they "imply no mathematical precision, but are simply a guide to help determine whether confusion is likely." *Homeowners Group v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir.1991). Given the fact-specific nature of trademark infringement actions, not all of the eight factors will be relevant in every case. *See id.* In every case, "[t]he ultimate question remains whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way." *Id.*

[18][19][20] In reviewing the district court's decision on the issue of a likelihood of confusion following a bench trial, we examine any relevant factual findings for clear error. *Daddy's Junky Music Stores, Inc.*, 109 F.3d at 279. Whether a likelihood of confusion exists is a mixed question of law and fact subject to *de novo* review. *Champions Golf Club, Inc. v. The Champions Golf Club, Inc.*, 78 F.3d 1111, 1116 (6th Cir.1996). That is, "the determination of what is the state of affairs regarding each factor is a finding of fact reviewed on the clearly erroneous standard, but the further determination of the likelihood of confusion based on those factors is a legal conclusion."

502 F.3d 504

Page 15

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

Induct-O-Matic Corp. v. Inductotherm Corp., 747 F.2d 358, 361 (6th Cir.1984) (internal quotation marks omitted) (alterations in original).

1.

[21][22][23] The strength of a mark is a factual determination of the mark's distinctiveness. *Daddy's Junky Music Stores, Inc.*, 109 F.3d at 280. A stronger mark is accorded greater protection and encroachment upon a strong mark is deemed more likely to produce confusion among buyers. *516 *Champions Golf Club, Inc.*, 78 F.3d at 1117. The district court deemed LWC's geographically descriptive mark to be weak because Leelanau is also the name of an AVA, rendering LWC's use of the word Leelanau in its mark unremarkable. LWC attacks this conclusion, citing its long-term use of the term "Leelanau" in its advertising, the success of its "Winter White" product, and the increase in its sales, going from approximately 30,000 cases in 2001 to nearly 70,000 cases in 2006. This evidence, while relevant to the question, is not sufficient to demonstrate clear error on the part of the district court. LWC possesses a descriptive mark, which is, in the spectrum of distinctiveness, weaker than an arbitrary or fanciful mark, for instance. See *Daddy's Junky Music Stores, Inc.*, 109 F.3d at 280. In addition, the district court was correct that the federal designation of the Leelanau Peninsula as an AVA substantially decreased the possibility that a potential consumer would, upon seeing the mark, necessarily think of LWC's product.

LWC's reliance on our decision in *Wynn Oil Co. v. Am. Way Serv. Corp.* (*Wynn II*), 943 F.2d 595 (6th Cir.1991), as support for its position that its mark is strong is inappropriate. There, the court considered the strength of a mark that was merely descriptive with secondary meaning and had become incontestable pursuant to 15 U.S.C. § 1065. LWC misreads *Wynn II* to state that "[a] trademark that is descriptive and has secondary meaning is a 'relatively strong' mark." In fact, *Wynn II* explains that "when a 'mark is incontestable, then it is presumed to be at least descriptive with secondary meaning, and therefore a relatively strong mark.'" 943 F.2d at 600 (quoting *Dieter v. B & H Indus. of*

SW. Fla., Inc., 880 F.2d 322, 329 (11th Cir.1989)). LWC's mark does not qualify for incontestable status under § 1065, and, thus, LWC may not take advantage of the principle set forth in *Wynn II*.

2.

[24][25] The Sixth Circuit evaluates the relatedness of goods by assigning the dispute in question to a place within a "tripartite system." *AutoZone, Inc. v. Tandy Corp.*, 373 F.3d 786, 798 (6th Cir.2004). If the parties are in direct competition, "confusion is likely if the marks are sufficiently similar." *Id.* at 797. If the goods are "somewhat related, but not competitive," the likelihood of confusion determination will turn on one of the other seven factors. *Id.* If the products are unrelated, a likelihood of confusion is "highly unlikely." *Id.* "Services and goods are related not because they coexist in the same broad industry, but are related if the services are marketed and consumed such that buyers are likely to believe that the services, similarly marked, come from the same source, or are somehow connected with or sponsored by a common company." *Daddy's Junky Music Stores, Inc.*, 109 F.3d at 283-84 (internal quotation marks omitted).

B & R and LWC produce the same product in a shared geographical region. While there is very limited overlap in their distribution channels, as discussed *infra*, to the extent that their wines are sold in the same locations, they are in direct competition. Because B & R and LWC do not possess similar marks, however, this factor weighs against a finding of a likelihood of confusion.

3.

[26][27][28] "Similarity of marks is a factor of considerable weight." *Daddy's Junky Music Stores, Inc.*, 109 F.3d at 283. In assessing similarity, a court should consider the "pronunciation, appearance, and *517 verbal translation of conflicting marks." *Id.*; *AutoZone, Inc.*, 373 F.3d at 795-96.

502 F.3d 504

Page 16

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

[29] LWC urges the court to ignore the words “Cellar” and “Chateau de” in evaluating the similarity of the relevant marks. Discarding these elements in assessing similarity, however, would run contrary to the rule that courts must “view marks in their entirety and focus on their overall impressions, not individual features.” *AutoZone, Inc.*, 373 F.3d at 795 (referencing “anti-dissection rule”) (internal quotation marks omitted) (citing *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 633 (6th Cir.2002)). LWC cites *Induct-O-Matic Corp. v. Inductotherm Corp.*, 747 F.2d 358 (6th Cir.1984), in support of its proposed approach. However, the court there held, in assessing the similarity of the marks “INDUCTO” and “INDUCTO-O-MATIC,” that “differences in spelling, number of syllables, the use of hyphens, and sound and visual appearance” were “slight and unlikely to prevent confusion.” *Id.* at 361. In reaching this conclusion, the court did not dismiss substantial differences in the marks at issue, the effect of LWC’s request. Moreover, the court did not set forth any rule establishing the more deconstructed approach LWC recommends.

Here, the similarities between “Leelanau Cellars” and “Chateau de Leelanau Vineyard and Winery” begin and end with the use of the word “Leelanau.” While the remaining words in the marks are terms often associated with wine producing, they are different words, and part of the remainder of B & R’s mark is in French. Further, B & R’s mark contains far more syllables than LWC’s. The marks are also visually dissimilar. The Chateau de Leelanau mark, which appears in italics, is accompanied by a cluster of grapes. LWC uses a number of images with its mark, which is composed of all capital letters. Many of those images depict nature scenes or ships. Despite the marks’ shared use of the word “Leelanau,” these differences are sufficiently significant to conclude that the marks are not so similar that they would produce a likelihood of confusion among purchasers. *See AutoZone, Inc.*, 373 F.3d at 795-96 (noting that competing marks had “some visual and linguistic similarities, but ultimately their differences outnumber their similarities such that the likelihood of confusion is small”).

4.

[30][31] “Evidence of actual confusion is undoubtedly the best evidence of likelihood of confusion.” *Id.* at 798 (internal quotation marks omitted). On the issue of actual confusion, LWC, on remand from this court, produced a consumer survey conducted by Dr. Parikh at four malls throughout Michigan: two in Detroit, one in Grand Rapids, and one in Traverse City. In the study, interviewees were taken into a room and shown an advertisement for Leelanau Cellars wine. Interviewees were then asked to put the advertisement away and look at five bottles of Chardonnay, all of which originated in Michigan. The study included a “test cell” and a “control cell.” The test and control cells both contained Turner Road, St. Julian, Wilhurst, and Zafarana wines. In the test cell, the fifth wine was Chateau de Leelanau. In the control cell, the fifth wine was Bel Lago. Participants in the study were, after viewing the advertisement and the wines, asked, “Do you believe there is OR is not a bottle of wine in this display that is the same as, or comes from the same source, that is, the same winery that puts out the wine in the advertisement that you just looked at?” Of those subjected to the test cell, 64 percent responded in the affirmative to the proposed question, and 54 percent*518 identified Chateau de Leelanau as the wine they believed matched the ad. Of those who selected Chateau de Leelanau, 38 percent justified their belief on the basis of the use of the name “Leelanau” in both the Leelanau Cellars ad and on the Chateau de Leelanau bottle. Among the individuals who did not identify a match between the wine in the ad and a wine in the display, 10 percent nevertheless believed that there was a “relationship, sponsorship, or association” between the winery in the ad and the winery producing one of the bottles in the display. Eight percent of those individuals identified Chateau de Leelanau only as the associated wine. By contrast, only 31 percent of those individuals exposed to the control cell identified Bel Lago as coming from the same or a related source as Leelanau Cellars and reached that conclusion based on similarities in the labels. After adjusting her results for survey noise or guessing, Dr. Parikh concluded that, the “net confusion level” ranged between 27 percent and 31

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

502 F.3d 504

Page 17

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

percent.

The district court permitted the admission of the Parikh study, but refused to give Parikh's survey significant weight, citing three reasons: (1) the universe of respondents was overbroad and failed to include individuals who were potential purchasers of B & R's wines; (2) the survey did not replicate conditions that consumers would encounter in the marketplace; and (3) the survey questions were suggestive and misleading. These were legitimate bases for declining to rely heavily on the findings of the Parikh study. The district court correctly recognized that the study failed to limit the respondent population to those persons likely to purchase defendant's products. *See Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477, 487-88 (5th Cir.2004) (stating that in a trademark infringement action where a survey is used, "the appropriate universe should include a fair sampling of those purchasers most likely to partake of the alleged infringer's goods or services") (internal quotation marks omitted). Although the study included adults who had or were likely to purchase a bottle of wine in the \$5 to \$14 price range, there was no attempt to survey only those people who would purchase moderately priced wines produced in the state of Michigan, undoubtedly a distinct group. Nor was the survey limited to wine purchasers who acquire wine through wine tasting rooms, the primary distribution source of B & R. The district court was also correct in concluding that the study failed to replicate actual market conditions. B & R sells its wines almost exclusively through its tasting rooms. Thus, it is unlikely that a purchaser of Chateau de Leelanau would find herself faced with the need to distinguish among various wines or, having walked into a B & R tasting room, erroneously believe that she was in fact at Leelanau Cellars.

[32] These deficiencies undermine the persuasiveness of the Parikh survey. Where a survey presented on the issue of actual confusion reflects methodological errors, a court may choose to limit the importance it accords the study in its likelihood of confusion analysis. *See Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 121 n. 6 (1st Cir.2006) (noting as to a consumer

survey submitted in trademark litigation that the "small sample size and large margin of error combined to cast considerable doubt on its statistical integrity"); *Ashland Oil, Inc.*, 1995 WL 499466 at *4 ("It is the trial court's responsibility to determine the probative value of a consumer survey, and it is appropriate for the trial court to accord little or no weight to a defective survey."). The district court did not err in refusing to assign the consumer study presented by LWC considerable *519 weight in its likelihood of confusion analysis. Because of its shortcomings, the Parikh study cannot serve as dispositive proof of the likelihood of confusion.

[33] The remainder of LWC's evidence of actual confusion amounts to anecdotal accounts of confusion, lacking in detail and primarily offered in the form of hearsay at the bench trial. For example, Robert Jacobson, the son of Michael Jacobson, testified as follows: "[O]ne of our tasting room employees came out and said to me, 'Boy, that family that just drove away came in and said, 'Boy, they went into Chateau de Leelanau on their way here thinking it was Leelanau Cellars. And they were really upset about it.'" Jacobson also claimed that, on one occasion, the Leeland Business Association erroneously believed that LWC was participating in a food and wine festival, when, in fact, B & R was participating. The district court deemed these accounts *de minimis* and declined to afford them substantial weight. This conclusion was not in error. These stories lack the details necessary to establish actual confusion and are sufficiently few in number that they do little to support LWC's claim of actual confusion. *See Champions Golf Club, Inc.*, 78 F.3d at 1120 ("[F]our incidents is not a considerable quantum of evidence of actual confusion, and minimal or isolated instances of actual confusion are, obviously, less probative than a showing of substantial actual confusion.").

5.

[34] Courts consider the respective marketing channels of the parties to a trademark infringement action to determine "how and to whom the

502 F.3d 504

Page 18

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

respective goods or services of the parties are sold.” *Gen. Motors Corp. v. Keystone Auto. Indus., Inc.*, 453 F.3d 351, 357 (6th Cir.2006) (internal quotation marks omitted). There is less likelihood of confusion where the goods are sold through different avenues. *See id.*

[35] There is very limited overlap between the distribution channels B & R and LWC utilize. B & R sells approximately 85 percent of its wine through its tasting rooms. Indeed, Kurtz testified that B & R wine almost “never leaves our tasting room.” B & R does not sell to major retail operations. LWC, by contrast, sells 25 to 30 percent of its wines through its tasting rooms and the remaining 70 to 75 percent through retail stores like Sam’s Club or Meijer’s. Thus, despite their operation within a common geographical area, Chateau de Leelanau and LWC are sold, for the most part, in entirely distinct environments. This factor suggests a lesser likelihood of purchaser confusion.

6.

[36] In assessing the degree of purchaser care, courts typically use a “typical buyer exercising ordinary caution” standard. *Daddy’s Junky Music Stores, Inc.*, 109 F.3d at 285. When potential buyers possess special expertise or are sophisticated purchasers of the goods at issue, a higher standard is appropriate, and the likelihood of confusion decreases. *Id.* Similarly, purchasers of more expensive products are more likely to exercise care, thus reducing the possibility of confusion. *Id.*

[37] LWC’s argument on the issue of consumer care is that the wines at issue are relatively inexpensive and not unusual. Thus, purchasers of the parties’ wines are typically making impulse buys and not exercising caution in selecting a wine. LWC is correct that the price of the wines at issue—less than \$20 per bottle—suggests that potential buyers might exercise less care in selecting a wine. Moreover, to the extent that Leelanau Cellars and Chateau de Leelanau are distributed in the same environments, it is likely the *520 case that buyers exercise comparatively little care in selection and the likelihood of confusion is accordingly somewhat

higher. However, the district court correctly noted that much of B & R’s wine is sold through its tasting rooms, not retail channels. A purchase through a tasting room—often involving the process of tasting and comparing various types of wine—is a more deliberative process and would imply a greater level of consumer care in selection. One could accordingly assume that the likelihood of confusion would be reduced if not eliminated in such an environment.

The Sixth Circuit has explained that the purchaser care factor “often will depend upon its relationship with the other seven factors.” *Id.* For instance, where marks are sufficiently similar, even a knowledgeable purchaser might incorrectly assume that he is purchasing the product of another party. *Id.* at 286; *Induct-O-Matic Corp.*, 747 F.2d at 364-65. In the instant case, however, the marks are not sufficiently similar that a careful purchaser, seeking out wine from B & R’s tasting room, would incorrectly assume that it was in fact purchasing wine from LWC.

7.

[38][39] The intent of the defendant in a trademark action is relevant because “purposeful copying indicates that the alleged infringer ... believes that his copying may divert some business from the senior user.” *Daddy’s Junky Music Stores, Inc.*, 109 F.3d at 286. Kurtz testified that B & R did not select its name in an attempt to benefit to LWC’s detriment. Smart explained that she and Kurtz originally selected the name “Le Couer de Leelanau,” or “the heart of Leelanau” in French, because of their winery’s location in the Leelanau Peninsula, “where ... the heart of Leelanau would be, right in the ... upper center,” and, because they believed the use of the word “le couer” was clever in light of Kurtz’s work as a cardiologist. Kurtz and Smart decided to change the name after hearing it repeatedly mispronounced as “liquor” or “leaker” or “looker.” Smart rejected the suggestion that the change was made with an eye toward creating confusion with LWC’s mark or capitalizing on LWC’s name recognition. Kurtz similarly denied any intent to attempt to take advantage of LWC’s prominence

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

502 F.3d 504

Page 19

502 F.3d 504, 84 U.S.P.Q.2d 1225
(Cite as: 502 F.3d 504)

among Leelanau Peninsula wineries. In support of its claim of intentional misuse, LWC points to Smart's testimony that B & R knew that LWC "existed as a winery on the Leelanau Peninsula."

In light of this evidence, the district court did not erroneously conclude that B & R did not select its name in the hope of creating confusion with LWC's mark. Although Kurtz and Smart's awareness of LWC might, under different circumstances, demonstrate wrongful intent, *see id.*, their express denials of an effort to profit improperly from LWC's name recognition undermines this suggestion. LWC, for its part, makes no attempt to challenge B & R's representation that the name Chateau de Leelanau was chosen for both geographic and personal reasons and had nothing to do with an attempt to take advantage of LWC's name recognition.

[40] Intent "is an issue whose resolution may benefit only the cause of the senior user, not of an alleged infringer." *Id.* at 287. Thus, this factor, although of no use to LWC, similarly does not accrue to B & W's benefit.

8.

[41] A strong likelihood that the alleged infringer will expand its business to compete with a senior user will contribute to a finding of a violation. *Id.* Leelanau has conceded that this factor is not relevant to the present analysis. We agree that this record does not support any claim *521 that B & R plans to increase the scale of its business and decline to weigh this factor in our analysis.

Having considered the foregoing factors, we conclude that LWC has not demonstrated that B & R's use of the mark "Chateau de Leelanau Vineyard and Winery" is likely to create an actionable likelihood of confusion. The district court correctly entered judgment on B & R's favor on that ground.

III.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

[42] LWC also brought a Lanham Act claim for unfair competition under 15 U.S.C. § 1125. Because the success of an action under this section requires a showing that an alleged infringer's actions create a likelihood of confusion, the resolution of LWC's trademark infringement claim under § 1114 disposes of this claim. *See Champions Golf Club*, 78 F.3d at 1123. LWC's state law claims for common law unfair competition and under the Michigan Consumer Protection Act fail for the same reason. *See Mich. Comp. Laws* § 445.903(1)(a) (including among "unfair, unconscionable, or deceptive" trade practices "[c]ausing a probability of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services"); *Goscicki v. Custom Brass & Copper Specialties, Inc.*, 229 F.Supp.2d 743, 756 (E.D.Mich.2002) (stating that applicable standard under Michigan common law for unfair competition claim "is the same as the tests for federal trademark infringement and federal unfair competition").

IV.

For the foregoing reasons, we affirm the judgment of the district court.

C.A.6 (Mich.),2007.
Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.
502 F.3d 504, 84 U.S.P.Q.2d 1225

END OF DOCUMENT